

May 15, 2014

M. Lois Bobak
Woodruff, Spradlin & Smart
555 Anton Blvd., Suite 1200
Costa Mesa, CA 92626-7670

Re: Your Request for Advice
Our File No. A-14-065

Dear Ms. Bobak:

This letter responds to your request for advice on behalf of Tustin Planning Commissioner Wisam “Sam” Altowaiji regarding his duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹ We offer no opinion on the application of other laws, which may apply, such as common law conflict of interest. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May Commissioner Altowaiji participate as a member of the Tustin Planning Commission when it considers its recommendation to the City Council regarding Tustin’s Commercial Development Guidelines (the “Guidelines”) for the existing Cultural Resources Overlay District (the “CRD”)?
2. May Commissioner Altowaiji participate in the selection of a consultant to prepare a master plan for the development of the downtown commercial core? Once the consultant is selected, may Commissioner Altowaiji participate as a Planning Commissioner in decisions regarding the development of the downtown commercial core?
3. May the Commissioner participate in the consideration of an amendment to the city’s current second residential unit requirements?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

4. If Commissioner Altowaiji has a conflict of interest in any of these decisions, can he participate in his personal capacity as a member of the public?

FACTS

The Tustin Planning Commission is composed of five Tustin citizens (including Commissioner Altowaiji) appointed by the City Council to hear, decide and make recommendations to the City Council on various land use and planning related issues.

The Guidelines:² Over the last several months, Tustin staff has prepared draft guidelines for commercial development within the CRD. The basic purpose of the CRD is to preserve and protect historic structures within the old town area, and to ensure that development within the area is consistent with the overall character of the CRD.

The Guidelines are intended to serve as a guide to property owners, architects, contractors, and other design professionals in understanding the City's goals for the preservation of historically significant commercial buildings and neighborhoods. Another purpose is to provide basic principles for achieving quality design and development compatible with the character of the CRD. You stated that it is hoped that the Guidelines will help property owners and design professionals in designing projects that are acceptable and consistent with the design criteria and standards established for the CRD in already adopted zoning ordinances.

The draft Guidelines does not change the permitted uses of properties within the CRD, nor do they change the development standards applicable to development, including height, setback, parking and other similar requirements. Rather, the Guidelines summarize provisions in the California Historical Building Code and other relevant state and federal standards for the preservation of historic buildings. The document contains rehabilitation guidelines for storefronts, windows, entrances, decorative elements, awnings, materials, and cleaning and painting. It also presents ideas for making a building more sustainable through increased energy efficiency, including weatherization, heating and cooling, roofs, windows, and solar technology.

The Guidelines contain information on converting a historic building to a different use, and discusses site plan considerations such as compatibility, scale, mass, height, setbacks, and materials for both old reuse and rehabilitation of existing structures and new development. The Guidelines discuss location and design for surface lots, parking structures, and curbside, and make suggestions regarding appropriate landscape design, street furniture, walkways, outdoor sales and seating, fences and walls, lighting, bicycle lanes and racks, and public art. The Guidelines also discuss sign types, historic signs, and general sign guidelines.

² The Planning Commission was to consider the draft Guidelines at a public meeting scheduled for March 25, 2014. You stated in a communication dated April 4, 2014 that the item had been put over in order to obtain the Commission's advice prior to having a vote on the Guidelines.

In our telephone conversation of April 16, 2014, you clarified the following:

- The Guidelines apply to all nonresidential property in the CRD. Residential property would only be subject to the guidelines were the owners to go through rezoning of the residential property to commercial.
- You also provided a map that clarified the type and location of property in the CRD. The CRD includes several blocks of residential property that is not subject to the guideline decision. Most of the commercial property in the CRD is in the extreme eastern portion of the CRD. Most of the western portion of the CRD is residential. Residential properties are not subject to the Guidelines. You also noted that in these predominantly residential areas, it would be unlikely that the residential property would be permitted to convert to commercial.
- In the CRD area stretching westward (beyond the commercial core area) two Public/Institutional (“PI”) properties (no commercial properties). You noted that PI properties, while subject to the Guidelines, are unlikely to have to conform to them because the PI property is used or authorized for public, quasi-public and institutional use. Examples of PI properties include places of worship, city hall, civic center, community center, federal, state, county, district office buildings, hospitals, libraries, lodges, clubs, and social halls, military installations, open space reservations, parks, playgrounds, and recreation centers (public), post office, public parking, schools (public) and school administration offices.

The Planning Commission does not have the authority to adopt the Guidelines. Rather, its role is limited to making a recommendation to the City Council for final action. You stated that you were not aware of any facts or circumstances that suggest that there is anything unique about Commissioner Altowaiji’s condominiums or the proposed Guidelines that would suggest that the Guidelines would impact Commissioner Altowaiji’s interests in a manner different from any other residential or commercial properties in or adjacent to the CRD.

Hiring a Consultant for the Master Plan: In February 2014, the City of Tustin issued a request for proposals from consultants interested in working with the City on the development of a master plan or similar document for the City’s downtown commercial core area. The City has three basic objectives for the plan. The first is the development of an approach to the planning, design and management of public spaces within the plan area to create a “sense of space.” The second objective is to identify positive attributes and design goals and policies that will help to insure that future development successfully meets the new vision. Finally, the plan will identify underutilized land and analyze existing land use patterns and regulations, and make recommendations regarding potential changes to the City’s General Plan, Zoning Code and Zoning Map to implement the new vision developed by the plan.

The Second Unit Ordinance: The Planning Commission may be taking up possible amendment to the rules governing second units on single lots. The proposals may change the rule to the following: (1) prohibit new accessory guest rooms in CRD, (2) allow new second residential units on any residentially zoned lot in CRD regardless of lot size; (3) limit the maximum unit size to 50 percent of the primary unit (not to exceed 1,200 square feet); (4) require one garage parking space for smaller (one bedroom) second units; two garage parking spaces for larger units (two or more bedrooms), in addition to two garage parking spaces for the primary residence; (5) allow tandem garage parking spaces for new second residential units (when units are larger and a total of four garage parking spaces are required); and (6) require that impact fees (park fees, school fees, etc.) would need to be paid for all new second units.

Commissioner Altowaiji owns a 20 percent interest in four condominium units located near the City's CRD. The remaining 80 percent of the four units is owned by adult friends and nondependent members of Commissioner Altowaiji's family. As a partial owner of the units, Commissioner Altowaiji also has an undivided interest in the common area of the condominium development. You asked us to assume that Commissioner Altowaiji's interests in the units and the common areas exceed \$2,000. None of the units in which Commissioner Altowaiji has an ownership interest are located within 500 feet of the boundaries of the CRD. However, one corner of the common area of the condominium complex is located within 500 feet of that boundary.

On April 24, 2014, you noted that the Commissioner's units are used as business rental property and leased to tenants.

CONCLUSIONS AND ANALYSIS³

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable⁴ that the decision will have a material financial effect on one or more of the public official's interests.⁵ (Section 87103.)

³ Amendments to Regulations 18705.2 and 18706 were adopted by the Commission and will be submitted to the Office of Administrative Law for review. Although not currently effective, the regulations express the Commission's policy concerning application of the conflict of interest rules of the Act. Therefore, staff is advising consistent with the Commission's policy.

⁴ A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

⁵ When a public official who holds an office specified in Section 87200 (including planning commissioners) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the interest as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

You have identified one interest that may result in a conflict of interest for the Commissioner -- his 20 percent ownership interest in four condominium units located near the City's CRD. You stated on April 24, 2014 that the condominium units are rented out to tenants and not occupied by the Planning Commissioner or his family. You have not inquired about any potential conflict of interest based upon the Commissioner's tenants who are sources of income. Accordingly, our analysis is limited to the Commissioner's interest in the identified condominium units.

1. The Commissioner does not have a conflict of interest with respect to the Guidelines.

Revised Regulation 18705.2(a)(1-14) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is deemed material. While the newly adopted regulation maintains the previous 500 foot rule, it recognizes that under some circumstances the value of the official's property may be unaffected by a decision on a subject property within 500 feet of the official's property, and allows the Commission to issue advice negating the rule when the effect may not be considered material. (Regulation 18705.2(a)(11).)

Moreover, additional amendments to the regulation now provide that real property in which an official has a financial interest "does not include any common area as part of the official's ownership interest in a common interest development...." (Regulation 18705.2(d)(4).) So were we to apply Regulation 18705.2 to your facts, the Commissioner's property would be beyond 500 feet of the CRD.

However, you noted that the Commissioner's units are used as business property and leased to tenants. Regulation 18705.2(a)(11) provides that property used for commercial (income producing) purposes is not analyzed under the 500-foot rule, but rather under Regulation 18705.1 as a business asset. (Regulation 18705.2(a)(11); Regulation 18705.1(d)(1)⁶.) Under the current business entity rule, assuming his condominiums are not owned by a publically traded business and the business that owns the condominiums is a relatively small business enterprise, the effect is considered material only if one of the following is true:

"(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

"(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

⁶ Regulation 18705.1(d)(1) defined assets of a business to include all property, real and personal . . ."

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”
(Regulation 18705.1(c)(4).)

However, you stated that the decision in question was to merely recommend adoption of “guidelines” rather than imposing any new requirements or conditions that would impact real property in the CRD, or other properties outside the CRD. We see no facts to suggest that the establishment of guidelines within the CRD could foreseeably influence the market value of the Commissioner’s condominiums located outside the district at a level reaching the applicable thresholds in Regulation 18705.1 .

2. The Commissioner does not have a conflict of interest in the selection of the consultant.

Based on your facts, the decision on who to hire as a consultant will have no financial effect on the Commissioner’s condominium units. Thus, the Commissioner may participate in the selection of the consultant so long as the Commissioner does not have an independent interest in the consultants under consideration (such as having received income from them in the prior 12 months).

With respect to the second part of your question, it is impossible to provide formal advice concerning future decisions to implement the downtown commercial core once a consultant is selected, since the details of any decisions that may come before the Commissioner are unknown at this point. Once specific decisions are presented to the Planning Commission, you may wish to contact us for further advice.

3. The Commissioner does not have a conflict of interest with respect to the Second Unit Ordinance.

The Planning Commission will be considering a proposal to allow new second residential units on any residentially zoned lots in the CRD (regardless of lot size), but will limit the second units to efficiency units/studios (i.e. max of 400 to 600 square feet.) In addition, the proposal would allow carports or garages for second units and require just one covered parking space for second unit.

As discussed above, since the Commissioner’s units are used as business property and leased to tenants, Regulation 18705.1 applicable to business entities would apply. (See Regulation 18705.2(a)(11).) Similar to the discussion surrounding question 2 above, you have provided no facts to indicate that a potential change in the second unit ordinance will affect the Commissioner’s businesses revenues, expenses, assets or liabilities with regard to his condominiums at the levels set forth in Regulation 18705.1(c)(4).

Because we have determined that, under the facts presented, it does not appear that the Commissioner has a conflict of interest with respect to the decisions presented, we need not address your final question.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

ENCLOSURES

Regulations 18705.2 and 18706 (as amended April 17, 2014)